

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Levine/Schwab Partnership d/b/a Schwab	)	File Nos. BNP-20140715ABO,
Multimedia LLC	)	BMP-20190522AAJ,
KWIF(AM), Culver City, CA	)	BMP-20201026AAC
	)	Facility ID No. 161348

**MEMORANDUM OPINION AND ORDER**

**Adopted: January 5, 2022**

**Released: January 5, 2022**

By the Commission:

**I. INTRODUCTION**

1. Levine/Schwab Partnership d/b/a Schwab Multimedia LLC (Schwab), permittee of KWIF(AM), Culver City, California (Station), filed an Application for Review (AFR)<sup>1</sup> seeking review of a Media Bureau (Bureau) Order which declined to reconsider the denial of Schwab's request to toll the Station's construction deadline.<sup>2</sup> Intelli LLC (Intelli) opposes the AFR.<sup>3</sup> For the reasons set forth below, we deny the AFR.

**II. BACKGROUND**

2. Schwab was authorized to construct a new AM station in the Los Angeles area on November 2, 2016, but never built the Station.<sup>4</sup> The Station's construction permit (Permit) authorized Schwab to build at its proposed site (Original Site) within a standard three-year broadcast construction period expiring November 2, 2019.<sup>5</sup> However, Schwab requested tolling of the construction period four times under a provision of the Commission's rules (Rules) which temporarily stops the three-year clock if

<sup>1</sup> Levine/Schwab P'ship Application for Review, Application File No. BNP-20140715ABO (filed Jan. 7, 2021) (AFR). *See also*, *Broadcast Applications*, Public Notice, Report No. 29903, at 3 (MB Jan. 12, 2021).

<sup>2</sup> *Levine/Schwab P'ship*, Letter Order (MB Dec. 7, 2020) (*Decision*), dismissing in part and denying in part recon. of *Levine/Schwab P'ship*, Letter Order (MB Sept. 25, 2020) (*Tolling Denial*).

<sup>3</sup> *See* Intelli, Opposition to Application for Review (rec. Jan. 13, 2021) (Opposition). Intelli is the licensee of KSPA(AM), Ontario, California, which operates on a first-adjacent channel in the same AM market. Intelli acquired the Station in 2018 from Ontario Broadcasting, LLC (Ontario), which had previously challenged the initial grant of the Station's construction permit.

<sup>4</sup> Schwab applied for the Permit in 2004. *See* Application File No. BNP-20040130ATD (granted Nov. 2, 2016). The channel was not immediately available for competitive bidding, however, because the availability of the frequency was dependent upon reaching finality in a separate proceeding. In that proceeding, which Schwab and Ontario participated in, the Bureau determined that another permittee was unable to build a Culver City AM station following site difficulties and did not qualify for additional construction time. *See Royce Intern. Broad. Co.*, Memorandum Opinion and Order, 23 FCC Rcd 9010 (2008), *recon. dismissed*, 26 FCC Rcd 9249 (MB 2011), *rev. denied sub nom. Royce Intern. Broad. Co. v. FCC*, 476 Fed. Appx. 866 (D.C. Cir. 2012) (per curiam) (*Royce*). In 2014, after resolution of that matter, the channel was included in Auction 84 and Schwab prevailed in the bidding.

<sup>5</sup> *See Broadcast Actions*, Public Notice, Report No. 48856, at 3 (MB Nov. 7, 2016).

construction is prevented by certain circumstances beyond the permittee's control.<sup>6</sup> The Bureau granted tolling and revised the construction deadline to April 13, 2020, based on the amount of time required to resolve a challenge to the initial permit grant filed by the former licensee of Intelli's station.<sup>7</sup>

3. Schwab also submitted to the Commission two additional tolling requests that are relevant to the AFR.<sup>8</sup> First, the Bureau granted a tolling request that Schwab filed on March 23, 2020, when Schwab was authorized to construct at its Original Site.<sup>9</sup> Schwab claimed therein that a March 2020 shelter-in-place order by the Governor of California in response to the coronavirus (COVID) pandemic<sup>10</sup> made it impossible "to get any vendors to commence installation of any equipment."<sup>11</sup> The Bureau treated the circumstances as a natural disaster<sup>12</sup> and granted tolling until the earlier of September 23, 2020 or lifting of the Governor's COVID-related restrictions.<sup>13</sup> Subsequently, the Bureau denied a September 21, 2020 request in which Schwab sought to extend that tolling.<sup>14</sup> The Bureau found no

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<sup>6</sup> See 47 CFR § 73.3598(b). Circumstances that qualify for tolling treatment are administrative or judicial review of the permit grant, natural disasters, pending international approvals (for Low Power FM and specified noncommercial educational stations), and failure of a Commission-imposed condition precedent to construction. *Id.* The Bureau also may grant more time by waiver of the three-year construction period, 47 CFR § 73.3598(a), for impediments of a similar magnitude beyond the permittee's control.

<sup>7</sup> See 47 CFR § 73.3598(b)(2); Petition for Reconsideration of Ontario Broad., LLC, Application File No. BNP-20140715ABO (filed Dec. 1, 2016), *recon. dismissed, KWIF(AM), Culver City, California*, BNP-20140715ABO, Letter Order (MB April 14, 2017) (2017 Letter Order); *see also* Schwab, Petition for Tolling (rec. Dec. 7, 2016). The 2017 Letter Order stated that Ontario had not shown that it was aggrieved by the permit grant and rejected Ontario's contention that the Station would not provide adequate daytime coverage to Culver City. 2017 Letter Order at 2.

<sup>8</sup> Another tolling request, filed in December 2019, became moot because it was based on alleged difficulties at a proposed new site (2019 Site) that Schwab chose not to pursue after an objection by Intelli. *See* Schwab, Petition for Tolling (rec. Dec. 4, 2019) as supplemented. The Bureau briefly granted the 2019 Modification Application on February 5, 2020 and tolling treatment on February 13, 2020 but rescinded those actions on February 14, 2020 and February 19, 2020 respectively upon learning of an October 4, 2019 objection from Intelli. *See Levine/Schwab P'ship*, Letter Order, Application File No. BMP-20190522AAJ (MB Feb. 5, 2020) (2019 Modification Application), grant rescinded Feb. 14, 2020 without decision, *Broadcast Applications*, Public Notice, Report No. 29678 (MB Feb. 20, 2020); *John Trent, Esq.*, Letter Order, Application File No. BMP-20190522AAJ (MB Feb. 13, 2020), tolling rescinded by Email from Victoria M. McCauley to John Trent (Feb. 19, 2020 4:34 p.m.). While the reinstated application and tolling request were pending, Schwab decided not to pursue the 2019 Site. *See Decision* at 5, n.45; Petition at 2.4. Impediments at a desired but not yet authorized site do not form any basis for tolling. *See JNE Investments*, Memorandum Opinion and Order, 23 FCC Rcd 623, 629-30, para. 17 (2008) (*JNE*).

<sup>9</sup> Tolling Request and/or Request for Waiver of 47 USC § 319(b) of *Levine/Schwab P'ship*, Application File No. BNP-20140715ABO (filed Mar. 23, 2020) (March 2020 Tolling Request). *See* 47 CFR § 73.3598(b)(1).

<sup>10</sup> Governor of California, Executive Order N-33-20 (Mar. 19, 2020) (Governor's Order), available at <https://www.gov.ca.gov/wp-content/uploads/2020/03/3.19.20-attested-EO-N-33-20-COVID-19-HEALTH-ORDER.pdf> (last visited Oct. 7, 2021).

<sup>11</sup> March 2020 Tolling Request at 2. Schwab did not supply a copy of the Governor's Order or explain that Schwab no longer had permission to use the Original Site.

<sup>12</sup> 47 CFR § 73.3598(b)(2) (tolling for up to six months when construction "is prevented due to an act of God, defined in terms of natural disasters (e.g., floods, tornados, hurricanes, or earthquakes)").

<sup>13</sup> *Levine/Schwab P'ship*, Application File No. BNP-20140715ABO, Letter Order (MB Mar. 24, 2020). The Bureau indicated that when tolling ended, 22 days would remain in which to complete construction. *Id.*

<sup>14</sup> *See* Request for Extension of Tolling Issued March 24, 2020, of *Levine/Schwab P'ship* (filed Sept. 21, 2020) (September 2020 Tolling Request). Schwab based its request on the ongoing effects of COVID and smoke from wildfires in Southern California. *Id.* at 2. However, the Bureau found that Schwab had not shown any connection between the wildfires and lack of construction because Culver City was not in an area that was evacuated or burned. *See Decision* at 3. Schwab did not seek review of the fire-related denial.

evidence of a causal connection between Schwab's claimed continued COVID-related impediments and its failure to construct.<sup>15</sup> For example, the Bureau noted that radio stations are "essential services," whereas the Governor's Order only restricted activities of non-essential businesses.<sup>16</sup> The Bureau also stated that Schwab had not submitted any evidence that it tried to construct.<sup>17</sup> Accordingly, the Bureau found that tolling had ended and revised the Station's construction deadline to October 30, 2020.<sup>18</sup>

4. On October 26, 2020, four days before the end of the Station's construction period, Schwab timely filed a Petition for Reconsideration and concurrently filed an application (2020 Modification Application) to modify the Permit to specify another site (2020 Site).<sup>19</sup> The Petition included new evidence attempting to show earlier efforts to construct. The Petition also noted that Schwab had lost the landlord's permission to use the Original Site well before filing the March 2020 Tolling Request.<sup>20</sup> The Bureau's December 7, 2020 *Decision* dismissed in part and otherwise denied reconsideration and dismissed the 2019 and 2020 Modification Applications. The *Decision* ruled that information that Schwab submitted for the first time on reconsideration to demonstrate purported construction attempts was procedurally barred because Schwab could have presented it earlier. The Bureau also determined that the information would not, in any event, have changed the outcome.<sup>21</sup> The *Decision* briefly noted that Schwab was no longer able to use the Original Site. The *Decision* also dismissed, without consideration, an untimely opposition from Intelli, licensee of same market station

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<sup>15</sup> *Tolling Denial* at 1.

<sup>16</sup> *Id.*

<sup>17</sup> The *Tolling Denial* stated that Schwab had offered no explicit evidence of an attempt to construct, such as (i) evidence that equipment was ordered on time but had been delayed due to shipment constraints or supply chain issues; (ii) correspondence from tower crews indicating that they were scheduled to install equipment but did not have the crew to send; and/or (iii) invoices demonstrating expenditures to further construction. *Id.* The Bureau also mentioned that Schwab had not provided a tower site lease but later disavowed that factor as inconsistent with Commission precedent. See *Decision* at n.47, citing *WPHR(FM), Ashtabula, Ohio*, Memorandum Opinion and Order, 11 FCC Rcd 8513, 8518, para. 17 (1996).

<sup>18</sup> The Bureau erroneously stated that the Station's new construction deadline would be March 6, 2021 – significantly more than the 22 days remaining in the construction period – but the Bureau corrected that error in a letter issued on October 8, 2020. *Levine/Schwab P'ship*, Letter Order (MB Oct. 8, 2020) (amending the construction permit to specify an expiration date 22 days thereafter *i.e.*, October 30, 2020) (*Correction Letter*). The Bureau gave Schwab the benefit of the error by beginning to count the remaining 22 days from the date of the *Correction Letter* without deducting the period that had elapsed from the September 25, 2020 *Tolling Denial*.

<sup>19</sup> See *Levine/Schwab P'ship* Petition for Reconsideration (rec. Oct. 26, 2020) (Petition); Application File No. BMP-20201026AAC (rec. Oct. 26, 2020); *Broadcast Applications*, Public Notice, Report No. 29855, at 4 (MB Oct. 30, 2020).

<sup>20</sup> See Petition at 2; see also *Decision* at n.45.

<sup>21</sup> See *Decision* at 4. The information consisted of: (1) a copy of an August 2019 lease for the 2019 Site; (2) a copy of an August 2020 potential lease for the 2020 Site; (3) an October 2020 letter from the President of Kintronic Labs Inc. who had been working with Schwab for about three years; (4) an April 2020 email from Nautel Transmitter; (5) an email from a consulting engineer that had been working with the Station since 2018; (6) a list of equipment for the Station's studios; (7) an email from the President of the Culver City Chamber of Commerce who indicated that he had been working with Schwab for more than a year and that the pandemic-mandated closure of the shopping mall on whose property the 2020 Site was located "has slowed down the process for [antenna permitting] with the City"; (8) a site survey for the 2020 Site, invoices for legal fees related to the 2020 Site, and attorney-client agreements; (9) Culver City and Los Angeles County public health orders relating to the pandemic; and (10) air quality daily values for 2020 for Culver City. The Bureau noted that the information could have been submitted with the September 2020 Tolling Request because the documents either pre-dated that request or were prepared afterwards but conveyed information that would have been known to Schwab at the time of the September 2020 Tolling Request. *Id.*

KSPA(AM).<sup>22</sup> Schwab filed the AFR on January 7, 2021 arguing that the Bureau should have granted the September 2020 Tolling Request and 2020 Modification Application.

5. As noted above, Schwab first referenced its loss of the Original Site in the Petition. It repeats its explanation in the AFR. Specifically, Schwab states that the landlord of the Original Site rescinded a verbal agreement with Schwab because a different station, KABC, began using the site.<sup>23</sup> Schwab does not provide an exact date it lost the Original Site, but states that the loss was due to recission because of KABC and that Schwab thereafter applied to move to the 2019 Site.<sup>24</sup> The Bureau granted the KABC license in February 2018.<sup>25</sup> Schwab filed its responsive application to move to the 2019 Site on May 22, 2019. The March 2020 Tolling Request, however, was silent as to the site loss issue and suggested that Schwab could still construct at the Original Site but for COVID.<sup>26</sup> In the Petition, Schwab stated that it was “prevented” from operating at the Original Site “after the landlord withdrew its approval” and that an informal objection to its 2019 Modification Application necessitated the search for yet another site, culminating in Schwab’s filing of the October 2020 Modification Application.<sup>27</sup>

### III. DISCUSSION

6. We affirm the denial of tolling and deny the AFR.<sup>28</sup> Based on the record evidence, we conclude that site loss, a circumstance which does not qualify for tolling, was the proximate cause of Schwab’s inability to construct. Accordingly, we reject Schwab’s allegation that the Bureau erred in not granting tolling based on other causes, such as COVID. We will, however, address Schwab’s pandemic-related arguments briefly in the interest of a complete record. As a result, we deny the AFR on alternative

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<sup>22</sup> See Opposition to Petition for Reconsideration of Intelli, LLC, BNP-20140715ABO (rec. Nov. 16, 2020); 47 CFR § 1.106(g).

<sup>23</sup> See Petition at 2; AFR at 2.

<sup>24</sup> AFR at 2-3 (stating that the landlord for the Original Site withdrew its permission to use the site “after KABC(AM) relocated to the site” and that “[b]ecause of the KABC move, LSP was forced to relocate its proposed facility” and “[s]ubsequently” filed the 2019 Modification Application).

<sup>25</sup> See Application File No. BMML-20170710ACF (granted Feb. 15, 2018). The Bureau granted the KABC construction permit in 2016. See Application File No. BP-20151013ABI (granted Mar. 31, 2016). In its 2019 Modification Application, Schwab suggested that the Original Site was not technically feasible due to KABC’s use of the site. Application File No. BMP-20190522AAJ, Waiver Request (“The original permit site is not usable now, because KABC (AM) moved in to diplex there along with KWKW and KFOX and now the KWIF facility can’t ‘fit.’”).

<sup>26</sup> See March 2020 Tolling Request at 2 (“As a result of the Commission’s actions last month [returning the 2019 Modification Application to pending status, Schwab] returned to the originally granted facility parameters and began planning for same in order to complete the facility pursuant to the Construction Permit parameters. . . but the events of the past 3 weeks associated with COVID-19. . . culminating with the [Governor’s Order] commanding individuals to shelter in plac[e] have made accomplishing that task now impossible as [Schwab] is unable to get any vendors to commence installation of any equipment.”).

<sup>27</sup> Petition at 2, 4; see also AFR at 3. Schwab has not stated when it stopped working toward operation at the Original Site.

<sup>28</sup> Because we do not rely on the Opposition to the AFR filed by Intelli in addressing the AFR, we need not resolve whether Intelli has standing to file the Opposition to the AFR in light of its late-filed Opposition to the *Tolling Denial*. See, e.g., *Warren C. Havens*, Order on Reconsideration, 25 FCC Rcd 511, 511 n.3 (2010) (declining to address the issue of whether filer had standing to oppose petition for reconsideration because “we have not relied on the opposition”); *JNE*, 23 FCC Rcd at 628, para. 13 (declining to address standing argument where Commission did not rely upon opposition in denying application for review); *Capital Radiotelephone, Co., Inc.* Memorandum Opinion and Order, 16 FCC Rcd 7468, 7471 n.25 (2001) (declining to address argument that filer lacked standing to file opposition because “we have not relied upon [the] opposition and therefore we need not address the standing argument”).

and independent grounds because Schwab did not provide adequate evidence with its September 2020 Tolling Request to support its claim that the COVID pandemic was the cause of its continued failure to construct. Additional information about Schwab's attempts to construct provided in the Petition was late-filed and procedurally barred. Even had it been timely, the evidence was insufficient to justify an extension of tolling. The Bureau appropriately dismissed Schwab's applications to modify the Permit, which had expired by its own terms and, thus, could no longer be modified.<sup>29</sup>

7. **Site Loss.** In both the March 2020 Tolling Request and the September 2020 Tolling Request, when Schwab sought to extend tolling, it relied on the Governor's Order as the justification for tolling.<sup>30</sup> Accordingly, rather than evaluating the effect of site loss, the Bureau denied the September 2020 Tolling Request based on its closer examination of the Governor's Order and Schwab's failure to demonstrate that it undertook any construction efforts that were thwarted by COVID. Likewise, the Bureau denied reconsideration on this basis.

8. We conclude that site loss was the proximate cause of Schwab's inability to construct. In short, we find that Schwab lost the Original Site (authorized in November 2016) when the owner rescinded Schwab's permission to use the site sometime prior to May 22, 2019. But for a brief period of approximately one week in February 2020 when the Bureau mistakenly granted an application for the replacement 2019 Site without considering Intelli's objection thereto,<sup>31</sup> Schwab never had authority to build anywhere other than the Original Site. The March 2020 Tolling Request stated that after the Bureau returned the 2019 Modification Application to pending status in February 2020, Schwab "returned to the original granted facility parameters and began planning for same in order to complete the facility pursuant to the Construction Permit parameters." However, Schwab has never shown that the lost oral lease agreement for the Original Site was reinstated or that any other useability issues were resolved. Moreover, Schwab has not shown that it continued any efforts to operate at the Original Site after it filed the March 2020 Tolling Request. We find that in March 2020, when the COVID pandemic was recognized, and again when Schwab filed the September 2020 Tolling Request, Schwab had no site that was both authorized and available. The Commission does not grant tolling for site-related difficulties because the choice of sites is a permittee's independent business decision within its control, and the Commission has determined that a three-year construction period provides ample opportunity for permittees to overcome unanticipated difficulties, including siting issues.<sup>32</sup> Schwab does not claim that the pandemic caused its years-long site availability issues or explain how the pandemic could have disrupted construction, equipment delivery, or arrival of crews at the Original Site at a time when Schwab no longer had the site owner's permission to build there.<sup>33</sup> Accordingly, we deny the AFR.

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<sup>29</sup> See *JNE*, 23 FCC Rcd at 632, para. 24 (following denial of request to toll construction period, application to modify the expired permit dismissed as moot because one cannot modify a permit that is no longer valid); *WYCO, Inc.*, Memorandum Opinion and Order, 18 FCC Rcd 16900, 16904, para. 9 (2003) (where license expired as a matter of law due to extended silence, modification application became moot because there was no longer any station license to modify); see also *WJWW, LLC*, Memorandum Opinion and Order, 32 FCC Rcd 2301 (2017) (modification application filed shortly before one year of station silence would not prevent automatic expiration of FM translator permit despite proposed use of translator to improve AM service).

<sup>30</sup> Although Schwab had advised the Commission in its 2019 Modification Application that the Original Site was no longer "usable," Schwab first mentioned loss of permission to use the site in a tolling context when it filed the Petition seeking reconsideration of the *Tolling Denial*.

<sup>31</sup> See *supra*, note 8.

<sup>32</sup> See *Royce*, 23 FCC Rcd at 9016, para. 15, citing *Streamlining*, 14 FCC Rcd at 17537-39.

<sup>33</sup> The Petition included an email dated Oct. 22, 2020 from the Culver City Chamber of Commerce President and CEO to Schwab owner Don Elliot stating that the closure of a shopping mall during "a heavy majority of the pandemic" slowed the process of gaining City approval of the antenna site identified in the October 2020 Modification Application. Petition at Ex. 7. Schwab did not identify this in its September 2020 Tolling Request as a factor causing delay, and neither Schwab nor the letter explain the connection between mall closure and permitting

(continued....)

9. **Other Arguments.** As a result of our denial of the AFR based on site loss, we need not address Schwab's non-site-based arguments. Alternatively and independently, we uphold the Bureau and deny review based on consideration of the non-site-based arguments. Schwab alleges that the Bureau made three errors – (1) failing to consider unique circumstances about the COVID pandemic and to afford Schwab the same COVID-related construction deadline waiver provided to certain FM translators in a *Deadline Notice*,<sup>34</sup> (2) ignoring material facts about its construction efforts, and (3) acting inconsistently with AM revitalization policies.

10. As an initial matter, we note that the Commission and its staff have, where appropriate, provided significant relief during the pandemic to broadcasters, other types of communications providers, and consumers.<sup>35</sup> But the Commission has long held that permittees that seek additional construction time following a disaster must establish a material nexus between the disaster and failure to construct.<sup>36</sup> The Commission reiterated this policy in the *Deadline Notice*, which pertained primarily to FM translator permittees but also apprised others seeking an extension of construction deadlines due to the pandemic, stating that they should make “a specific showing of the impact of the pandemic on the permittee,” which “may include such evidence as financial statements demonstrating the pandemic’s economic impact on

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delays for the antenna site, which was located on adjacent property owned by the mall. See *id.* Ex. 7 at 1 (lease agreement stating that facility will be “adjacent to Westfield Culver City [Mall].”). In any event, this email goes to whether the pandemic caused delay in an initial zoning process and at a potential new site rather than an authorized site, neither of which is a basis for tolling. See *JNE*, 23 FCC Rcd at 629-30, para. 17 (difficulties at site not yet authorized are not a basis for tolling); *Cram Commun., LLC*, Memorandum Opinion and Order, 23 FCC Rcd 658, 663, para. 13 (2008) (delay or denial of local approvals does not trigger tolling).

<sup>34</sup> See *Media Bureau Announces Availability of Construction Deadline Waivers for Certain FM Translator Stations Awarded in Auctions 99 and 100*, Public Notice, 35 FCC Rcd 9555, 9556 (MB 2020) (*Deadline Notice*). The *Deadline Notice* stated that it would be in the public interest to allow AM stations to complete construction of FM translators that would rebroadcast AM signals and announced that the Bureau would accept requests for construction deadline waivers from such permittees or other permittees who could show that COVID prevented or delayed completion. *Deadline Notice*, 35 FCC Rcd at 9556 (“this evidence may include financial statements demonstrating the pandemic’s economic impact on the individual permittee; affidavits or other evidence of the unavailability or components or tower crews; or copies of equipment orders”).

<sup>35</sup> In addition to the construction deadline waivers for certain FM translator stations discussed in greater detail below, the Commission has waived E-Rate reporting requirements for schools and libraries affected by COVID; provided certain carriers with flexibility to focus Universal Service Funds on hard-hit areas; facilitated telemedicine; promoted the use of funding from the Coronavirus Aid, Relief, and Economic Security (CARES) Act; and provided consumer tips to avoid COVID-related phone scams. See *Promoting Telehealth for Low-Income Consumers COVID-19 Telehealth Program, Report and Order*, 35 FCC Rcd 3366 (2020); *Schools and Libraries Universal Service Support Mechanism*, Order, 35 FCC Rcd 2978 (WCB 2020); *Availability of Construction Deadline Waivers for Certain FM Translator Stations Awarded in Auction 99 and 100*, Public Notice, DA 20-1059 (MB Sept. 10, 2020); FCC Partners with Institute of Museum and Library Services to Address Digital Divide During COVID-19, News Release (rel. May 21, 2020); *FCC Acts of Keep Communities Connected During COVID-19 Pandemic*, News Release (Mar. 30, 2020); FCC Consumer Advisory: COVID Scams, News Release (rel. Mar. 20, 2020).

<sup>36</sup> See *Wendell & Assoc.*, Memorandum Opinion and Order, 17 FCC Rcd 18576, 18580-81, paras. 14-16 (2002) (*Wendell*) (no waiver of construction deadline when claimed link between terrorist attacks of September 11, 2001 and permittee’s failure to complete construction was remote and weak because unavailability of engineer was due primarily to lack of a contractual commitment and failure to seek a non-local replacement); 47 CFR § 73.3598(d) (“Tolling resulting from an act of God will automatically cease six months from [the tolling request] unless the permittee submits additional notifications at six-month intervals detailing how the act of God continues to cause delays in construction, any construction progress, and the steps it has taken and proposes to take to resolve any remaining impediments.”).

the individual permittee; affidavits or other evidence of the unavailability of components or tower crews; or copies of equipment orders.”<sup>37</sup> In this case Schwab did not adequately meet that burden.

11. As a matter of procedure, we reject Schwab’s argument that the Bureau acted arbitrarily and capriciously by dismissing Schwab’s claims, submitted for the first time in the Petition, that Schwab had taken some steps to construct before the September 2020 Tolling Request. Schwab suggests that the Bureau was required to consider the late-filed information because Schwab filed it in response to the Bureau’s conclusion that the September 2020 Tolling Request lacked sufficient evidence.<sup>38</sup> We disagree. Schwab had not adequately supported the September 2020 Tolling Request, and Schwab thereafter attempted to present more information in the Petition.<sup>39</sup> Schwab’s submission of that information was contrary to the Rules, which preclude consideration of facts first presented on reconsideration unless the facts are new, previously unknown through the exercise of ordinary diligence, or consideration is required in the public interest.<sup>40</sup> Schwab’s late-filed information relates entirely to matters that occurred prior to the September 2020 Tolling Request and, thus, could have been timely presented therein.<sup>41</sup> Schwab did not explicitly seek a finding that consideration of the untimely evidence was in the public interest or even acknowledge that the new evidence was untimely. The Bureau properly found no public interest basis for consideration and dismissed the late-filed information.<sup>42</sup> The Commission has long rejected piecemeal submission of information.<sup>43</sup> We therefore independently and alternatively affirm the Bureau’s dismissal, in part, of the Petition.

12. Turning to the merits, we also independently and alternatively affirm the Bureau’s denial, in part, of the Petition. We find that the Bureau properly determined that the new information of purported construction steps, even had it been filed timely, would not have changed the outcome because nothing therein or in the September 2020 Tolling Request showed any meaningful construction efforts.<sup>44</sup> Specifically, Schwab’s receipt of a price quote for a transmitter and compilation of a list of studio equipment did not support a claim of construction efforts because Schwab provided no receipts or invoices showing it actually purchased equipment, that equipment it ordered had been delayed, or that it

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<sup>37</sup> *Deadline Notice*, 35 FCC Rcd at 9556.

<sup>38</sup> AFR at 3-4.

<sup>39</sup> *Id.* at 5-6. Schwab’s evidentiary showing in the September 2020 Tolling Request failed to show how the pandemic or wildfires had affected Schwab’s ability to construct any facilities, document construction efforts, or describe steps Schwab had taken to resolve the claimed impediments. *See* 47 CFR §73.3598(d) (requests for tolling beyond the initial term must “detail[]how the act of God continues to cause delays in construction, any construction progress, and the steps it has taken and proposes to take to resolve any remaining impediments”). In support of its request, Schwab attached two documents: “Blueprint for a Safer Economy, dated 9/21/20, “Find the Status of Activities in Your County,” showing the status of activities in Los Angeles County, available at <https://covid19.ca.gov/safer-economy/>, which does not address construction activities, broadcasting, or the communications industry, and (2) Culver City, “Citywide Coronavirus Update--Sept. 9, 2020,” which, among other things, addresses wildfires and “urges all individuals in impacted areas to avoid unnecessary outdoor exposure.” Schwab did not submit any evidence that it was attempting to construct authorized facilities in an “impacted area.”

<sup>40</sup> *See* 47 CFR § 1.106(c).

<sup>41</sup> AFR at 3-4.

<sup>42</sup> *Decision* at 4, 6.

<sup>43</sup> The purpose of section 1.106(c) is to “encourage applicants and others to provide complete information at an early stage, thereby minimizing the need for reconsideration proceedings. Our processes operate inefficiently at best when, as here, facts are presented piecemeal. . . . Therefore, a party who creates a partial record cannot supplement that record only after the initial decision specifies the particular respects in which it is deficient.” *Carolyn S. Hagedorn*, Memorandum Opinion and Order, 11 FCC Rcd 1695, 1696, para. 12 (1996); *see also Payne of Virginia, Inc.*, Memorandum Opinion and Order, 66 FCC 2d 633, 637, para. 8 (1977).

<sup>44</sup> *Decision* at 6.



had tried to install equipment but was unsuccessful in attempts to engage a construction crew.<sup>45</sup> That lack of evidence is consistent with loss of the Original Site -- delivery and installation of equipment at that location would not have been possible because Schwab no longer had permission to use the site, an impediment that was entirely unrelated to COVID. Schwab's claims of supply chain disruptions and worker shortages generally in California did not establish that Schwab itself experienced such issues or that such matters prevented the Station's construction. Schwab has throughout this proceeding relied on the Stage 1 shelter-in-place restrictions of the Governor's Order<sup>46</sup> without acknowledging that communications facilities are exempt from those requirements. Schwab contends that the exemption applies only to operating facilities and not to construction of yet unbuilt facilities.<sup>47</sup> As in the Petition, where it first raised this argument, Schwab cites no supporting authority for this assertion. Moreover, Schwab fails to acknowledge the Bureau's response to this argument or to show that the Bureau erred.<sup>48</sup>

13. We also reject Schwab's argument that the Bureau's earlier public notice concerning waiver of construction deadlines for certain FM translator stations is in any way relevant.<sup>49</sup> Schwab does not dispute the *Decision*'s statement that the *Deadline Notice* generally did not apply to non-translator permittees like itself. Schwab argues, however, that the *Decision* failed to recognize that Schwab experienced the "exact same" circumstances described in the *Deadline Notice*.<sup>50</sup> We disagree. The Bureau recognized that although the *Deadline Notice*'s public interest determination was limited to a particular group of FM translators, others could request waivers of construction deadlines under existing standards by showing the specific impact of the pandemic on the permittee.<sup>51</sup> As the *Decision* observed

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<sup>45</sup> The Bureau reasonably found that evidence submitted on reconsideration was not probative of construction efforts. *Id.* at 6. For example, neither an August 2019 lease for the 2019 Site, potential lease for the 2020 Site, legal bills, or other submissions proved that Schwab undertook construction efforts. *Id.*

<sup>46</sup> California established four stages of COVID-related restrictions, of which the Stage 1 Governor's Order was the most restrictive. See California, Update on California Pandemic Roadmap (Apr. 28, 2020), <https://www.gov.ca.gov/wp-content/uploads/2020/04/Update-on-California-Pandemic-Roadmap.pdf> (last visited Oct. 7, 2021). By the time of the September 2020 Tolling Request, California had moved into less restrictive Stages 2 and 3, but Schwab was silent about that change and whether construction could more readily proceed under the lesser state-level restrictions.

<sup>47</sup> AFR at 4.

<sup>48</sup> 47 CFR §1.115(b)(2). See *Decision* at 4, n.37 ("Schwab offers no support for this claim, which appears inconsistent with the State Public Health Officer's list of Essential Critical Infrastructure Workers.") (citing State of California, *Essential Workforce*, Sector 7, Communications and Information Technology, paras. 4, 6, 7, <https://covid19.ca.gov/essential-workforce/> (last visited Oct. 7, 2021) (defining essential communications workers to include "[w]orkers who support radio, television, and media service . . .," and "[w]orkers responsible for infrastructure construction," including "construction of new facilities"). Schwab states that in granting its March 2020 Tolling Request, the Bureau "recognized that tolling . . . should be granted due to the ongoing COVID-19 epidemic preventing construction efforts." AFR at 5-6. We recognize that the Bureau based its grant of the March 2020 Tolling Request on the Governor's Order but note that the Bureau had limited information at that time, both with respect to COVID in general and Schwab's specific circumstances. As discussed previously, the Bureau was then unaware of Schwab's site loss. The Bureau treated COVID-related tolling requests as urgent and, thus, granted tolling liberally without detailed verification of permittee contentions. The Bureau, thus, did not question Schwab's characterization of the Governor's Order or require Schwab to provide a copy of its text for verification of Schwab's claim. We note this Bureau-level decision is not binding on the Commission. See *Comcast Corp. v. FCC*, 526 F.3d 763, 769 (D.C. Cir. 2008).

<sup>49</sup> See AFR at 5.

<sup>50</sup> *Id.*, citing *Deadline Notice*, 35 FCC Rcd at 9555.

<sup>51</sup> See *Decision* at 5; see also *Deadline Notice* at n.4, citing *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); *WAIT Radio v. FCC*, 418 F.2d 1153, 1157-59 (D.C. Cir. 1969).



and we affirm, however, Schwab failed to demonstrate that COVID encumbered any of its construction efforts.<sup>52</sup>

14. Finally, we do not find any merit to Schwab's assertion that denial of tolling was inconsistent with Commission policies, including those promoting the revitalization of AM radio.<sup>53</sup> The AM revitalization proceeding modified AM engineering rules to assist existing AM broadcasters with matters such as signal coverage and listenability by, for example, promoting greater use of FM translators for rebroadcasting existing AM signals.<sup>54</sup> The proceeding did not change construction deadlines, which are uniform for all broadcast stations, and are necessary to ensure that the public benefits from the efficient use of its spectrum, and to prevent spectrum warehousing.<sup>55</sup> Nor did the proceeding alter the Commission's policy to toll construction deadlines only in compelling circumstances beyond a permittee's control and not for difficulties at the permittee's self-selected site. KWIF's status as a newly-authorized AM station forms no basis for any special deadline relief.<sup>56</sup>

#### IV. ORDERING CLAUSES

15. Accordingly, **IT IS ORDERED** that the Application for Review filed by Levine/Schwab Partnership d/b/a Schwab Multimedia LLC, permittee of KWIF(AM), Culver City, California, **IS DENIED**.

16. **IT IS FURTHER ORDERED** that the application to modify the unbuilt facilities of KWIF(AM), Culver City, California, Application File No. BMP-20201026AAC, **IS DISMISSED AS MOOT**.

17. **IT IS FURTHER ORDERED** that call sign KWIF(AM), Culver City, California, which is associated with a permit that has expired, **IS DELETED**.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

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<sup>52</sup> See *Decision* at 5, see also paras. 10, 12 *supra*.

<sup>53</sup> Schwab also argues that denial of tolling is inconsistent with the Commission's grants of deadline relief following hurricanes Harvey, Irma, and Maria in 2017 and Hurricane Michael in 2018. AFR at 5-6. It states that COVID, while not causing the physical damage of a hurricane, presents obstacles "no less devastating." *Id.* at 5. Schwab does not support its argument with cites to specific cases which it believes are comparable to its own, but we note that in any disaster, no matter its form, a permittee desiring tolling must establish a direct nexus between the disaster and its inability to construct. See *Florida Comm. Radio, Inc.*, Memorandum Opinion and Order, 35 FCC Rcd 6854, 6857-58, para. 9 (2020), *recon. denied*, Order on Recon., 35 FCC Rcd 14259 (2020) (recipient of tolling based on flooding from Hurricane Michael not entitled to additional tolling because it did not establish a continued nexus between the hurricane and its failure to construct six months later); *Wendell*, 17 FCC Rcd at 18580-81, paras. 14-16 (lack of causal link between 9/11 terrorist attacks and failure to construct AM station).

<sup>54</sup> See *Revitalization of the AM Radio Service*, First Report and Order, Further Notice of Proposed Rulemaking and Notice of Inquiry, 33 FCC Rcd 12145, 12156, para. 23 (2015) (subsequent history omitted).

<sup>55</sup> See *Streamlining*, 14 FCC Rcd at 17539, para. 35.

<sup>56</sup> We affirm the Bureau's conclusion that there are no grounds for tolling or waiver based on Schwab's observations that the Commission has recognized that AM stations provide important local programming, has not held an AM auction since that in which Schwab received the Permit, has not announced any plans to open another nationwide AM filing window, and that the Station is the "last" authorized AM station yet to be built. See AFR at 3, 6; *Decision* at 7.